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Supreme Court, U.S.
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No. (1)

IN THE
Supreme Court of the United States

BETTY TURNER

Petitioner

v.

PERRY COUNTY COAL CORPORATION
and
HOMER YOUNG

Respondents

On Petition For Writ Of Certiorari to the Kentucky Court of Appeals

PETITION FOR WRIT OF CERTIORARI

JAMES E. KELLER
Counsel of Record
GESS MATTINGLY &
ATCHISON, P.S.C.
201 West Short Street
Lexington, KY 40507
Telephone (859)252-9000
Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether a state court may discriminate against an individual born out of wedlock by denying her the right to inherit from the paternal estate on the *sole* basis that her father died prior April 26, 1977, the date that this Court decided *Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977)?[1]

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[1] In *Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977), this Court held that a total statutory disinheritance, from the paternal estate, of children born out of wedlock and not legitimated by the subsequent marriage of their parents is unconstitutional.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Betty Turner, prays that a Writ of Certiorari issue to review the opinion of the Kentucky Court of Appeals rendered on April 6, 2007.

OPINIONS BELOW

The Perry Circuit Court of the Thirty-Third Judicial Circuit of Kentucky entered a partial summary judgment against Petitioner on May 1, 2006. The partial summary judgment of the Perry Circuit Court is unpublished but is reprinted in the Appendix at 1a. The Kentucky Court of Appeals subsequently entered an opinion on April 6, 2007 affirming the partial summary judgment of the Perry Circuit Court. The opinion of the Kentucky Court of Appeals is published as *Turner v. Perry County Coal Corporation*, 242 S.W.3d 658 (Ky. App. 2007) and is reprinted in the Appendix at 5a. Then, on February 13, 2008, the Kentucky Supreme Court entered an order on denying Petitioner's motion for discretionary review of the opinion of the Kentucky Court of Appeals. The order of the Kentucky Supreme Court is unpublished and is reprinted in the Appendix at 12a.

JURISDICTION

The jurisdiction of the Supreme Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Section I of the Fourteenth Amendment to the United States Constitution provides: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

2. Kentucky Revised Statutes § 391.090(2) (repealed 1986) provided, in pertinent part, that "[a] bastard child shall inherit only from his mother and his mother's kindred."

3. Kentucky Revised Statutes § 391.105 provides, in pertinent part:

> (1) For the purpose of intestate succession, if a relationship of parent and child must be established to determine succession by, through, or from a person, a person born out of wedlock is a child of the natural mother. That person is also a child of the natural father if:
>
> (a) The natural parents participated in a marriage ceremony before or after the birth of the child, even though the attempted marriage

is void; or

(b) In determining the right of the child or its descendants to inherit from or through the father:

1. There has been an adjudication of paternity before the death of the father; or

2. There has been an adjudication of paternity after the death of the father based upon clear and convincing proof.

STATEMENT OF THE CASE

Petitioner, Betty Turner ("Turner"), was born out of wedlock on May 22, 1932 in Hazard, Perry County, Kentucky. She is the daughter of John B. "Buck" Combs, who was of "mixed" race, and Susie Coots, who was white. As a child, Turner was supported by her father but lived in a segregated society where she was unaccepted at the white school because she was too black and where she was unable to go to the black school because she was too white. Now, over thirty years after this Court decided *Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977), the Kentucky Court of Appeals has denied Turner's right to inherit from her father on the sole basis that her father died prior to April 26, 1977, the date this Court decided *Trimble*.

The real property that is the subject of the decisions below and of Turner's claims (hereinafter the "Real Property") was acquired by John B. Combs by General Warranty Deed dated May 14, 1948. Located on Curley Fork of Browns Fork of Big Creek in Perry County, Kentucky, the Real Property remained solely owned by Mr. Combs until he died intestate on December 29, 1962. Subsequent to his death (and prior to 2004), there were no transfers of the Real Property and no lawsuits or other legal proceedings involving the Real Property. To the contrary, the Real Property sat idle and unoccupied for over forty years.

In the latter part of 2004 and prior to filing the underlying civil action in the Perry Circuit Court,

Respondent, Perry County Coal Corporation ("Perry County Coal"), began purchasing purported "interests" in the Real Property. The grantors of these purported interests were certain descendants of John B. Combs as identified in an Affidavit of Descent dated February 16, 1967 and of record in the Office of the Perry County Clerk. Noticeably absent from the Affidavit of Descent was any mention of Turner, the daughter and sole child of John B. Combs; however, it was at the time that Perry County Coal began acquiring purported interests in the Real Property that it first became aware of Turner's claim thereto.

Perry County Coal then instituted the circuit court action wherein it sought an adjudication of ownership to and partition of the Real Property. Because Perry County Coal was aware of Turner's claim to the Real Property, she, along with Respondent, Homer Young, and certain other relatives of John B. Combs were named as a defendants in the state court partition. After answering, Turner filed a counterclaim and cross-claim wherein she sought an adjudication that she is the owner of the Real Property by virtue of Kentucky's laws of descent and distribution.

The parties filed cross motions for summary judgment with the circuit court wherein they sought an adjudication of Turner's rights to the Real Property. After hearing, the circuit court entered a partial summary judgment on May 1, 2006 wherein it made three rulings. App. 2a-3a. First, the circuit court held that, based on clear, convincing, and undisputed proof, Turner is the daughter of John B.

Combs. App. 2a. Second, the circuit court held that Turner's claims for recovery of the Real Property were brought within the applicable fifteen-year statute of limitations. App. 2a-3a. Despite these findings, however, the circuit court also ruled that Turner's ownership claims to the Real Property were barred by the Kentucky Supreme Court's holding in *Pendleton v. Pendleton*, 560 S.W.2d 538 (Ky. 1978) (hereinafter *Pendleton II*). App. 3a.

In *Pendleton II*, the Kentucky Supreme Court held that Ky. Rev. Stat. § 391.090, which provided that "[a] bastard child shall inherit only from his mother and his mother's kindred," was invalid in light of this Court's holding in *Trimble*. Despite recognizing the invalidity of Ky. Rev. Stat. § 391.090, the Kentucky Supreme Court also held that its opinion "shall have no retroactive effect upon the devolution of any title occurring before April 26, 1977 (the date of the *Trimble* opinion), except for those specific instances in which the dispositive constitutional issue raised in [*Pendleton II*] was then in the process of litigation." *Pendleton II*, 560 S.W.2d at 539.

Turner then appealed to the Kentucky Court of Appeals, which on April 6, 2007 rendered an opinion affirming the judgment of the circuit court. Although recognizing that this Court applied *Trimble* retroactively in *Reed v. Campbell*, 476 U.S. 852, 106 S.Ct. 2234, 90 L.Ed.2d 858 (1986), the Kentucky Court of Appeals held that the rule announced by the Kentucky Supreme Court in *Pendleton II* was not changed by this Court in *Reed*.. App. 10a. Turner then filed a motion for discretionary review with the

Kentucky Supreme Court, which motion was denied by order entered February 13, 2008. App. 12a.

REASONS FOR GRANTING THE WRIT

By discriminating against Turner on the sole basis that her father died prior to April 26, 1977, the Kentucky Court of Appeals has decided an important federal constitutional question in a way that conflicts with this Court's decision in *Reed v. Campbell*, 476 U.S. 852, 106 S.Ct. 2234, 90 L.Ed.2d 858 (1986). Likewise, the decision of the Kentucky Court of Appeals conflicts with the decisions of other state courts of last resort that have examined the retroactive application of the *Trimble* decision.

I. The Kentucky Supreme Court's Adoption of a Prospective-Only Application of *Trimble* Conflicts with Prior Decisions of this Court.

In *Trimble*, this Court held that a total statutory disinheritance from the paternal estate of children born out of wedlock and not legitimized by the subsequent marriage of the parents runs afoul of the Equal Protection Clause of the Fourteen Amendment. *Trimble*, 430 U.S. at 776, 97 S.Ct. at 1468. The rationale was straightforward: the imposition of disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. *Id.* at 769-70, 97 S.Ct. at 1465 (citing *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164,

175, 92 S.Ct. 1400, 1406, 31 L.Ed.2d 768 (1972)). While noting that an accurate and efficient method of disposing of property at death is an important state interest, this Court held that such an interest does not justify the complete exclusion of illegitimate children as their intestate fathers' heirs. *Id.* at 776, 97 S.Ct. at 1468.

Although *Trimble* involved an Illinois statute, the harsh common law rule under which an illegitimate child was *filius nullius* and incapable from inheriting from anyone was also evidenced in Ky. Rev. Stat. § 391.090 (repealed 1986), which stated that "[a] bastard child shall inherit only from his mother and his mother's kindred." Ky. Rev. Stat. § 391.090(2). Kentucky courts initially upheld the constitutionality of Ky. Rev. Stat. § 391.090. *Pendleton v. Pendleton*, 531 S.W.2d 507 (Ky. 1975), *vacated and remanded*, 431 U.S. 911, 97 S.Ct. 2164, 53 L.Ed.2d 220 (1977). But, on remand from this Court and in light of the *Trimble* holding, the Kentucky Supreme Court declared Ky. Rev. Stat. § 391.090 to be invalid. *Pendleton v. Pendleton*, 560 S.W.2d 538 (Ky. 1978) (*Pendleton II*). As set forth above, however, the Kentucky Supreme Court adopted a prospective application rule by holding that its "opinion shall have no retroactive effect upon the devolution of any title occurring before April 26, 1977 (the date of the Trimble opinion), except for those specific instances in which the dispositive constitutional issue raised in this case was then in the process of litigation." *Id.* at 539.

Nearly a decade after the *Trimble* decision, this

Court delivered its opinion in *Reed v. Campbell*, 476 U.S. 852, 106 S.Ct. 2234, 90 L.Ed.2d 858 (1986). In *Reed*, the appellant's father died intestate in Texas on December 22, 1976, some four months prior to this Court's decision in *Reed*. The Texas Court of Appeals had therefore held that § 42 of the Texas Probate Code, which prohibited an illegitimate child from inheriting from his or her father unless the parents had subsequently married, controlled. In other words, the Texas Court of Appeals, much like the Kentucky Supreme Court in *Pendleton II* and the Kentucky Court of Appeals in the opinion below gave *Trimble* prospective-only application. This Court ultimately reversed this judgment of the Texas Court of Appeals. *Reed*, 476 U.S. at 857, 106 S.Ct. at 2238.

Although recognizing that a state may assert special requirements upon an illegitimate child who asserts a right to inherit from his or her father, such as "applicable limitations on the time and the manner in which claims may be asserted," this Court held that Texas's interest in the orderly administration of the appellant's father's estate would have been served "equally well regardless of how the merits of the claim were resolved." *Id.* at 856, 106 S.Ct. at 2238. This Court thus held that the appellant's "interest in equal treatment protected by the Fourteenth Amendment of the Constitution–more specifically, the interest in avoiding unjustified discrimination against children born out of wedlock–should therefore have been given controlling effect." *Id.* (citations omitted).

Despite noting the holding in *Reed*, the Kentucky

Court of Appeals in the opinion below affirmed the prospective-only application of *Trimble* first adopted by the Kentucky Supreme Court in 1978 in *Pendleton II*. The opinion of the Kentucky Court of Appeals therefore conflicts with a prior decision of this Court.

Ironically, in light of *Trimble* and *Reed*, the Kentucky General Assembly amended Ky. Rev. Stat. § 391.105(b)(2) in 1988 to insure the orderly disposition of property at death and to assure the dependability of titles to property passing through intestacy. *See Harris v. Stewart*, 981 S.W.2d 122 (Ky. 1998). Such laws are entirely permissible provided that they bear a rational and substantial relationship to the furtherance of the legitimate state policies. *See Reed*, 476 U.S. at 855, 106 S.Ct. at 2237 (noting that a state legislature may enact laws imposing special requirements upon an illegitimate child who asserts a right to inherit from her father). And, Turner met all of the heightened requirements imposed by Kentucky statute.

But, by denying Turner's claims solely on the fact that her father died prior to the April 26, 1977, the Kentucky Court of Appeals has imposed discriminatory burdens on Turner beyond those contemplated by Ky. Rev. Stat. § 391.105. As recognized in *Reed*, a prospective-only application of *Trimble* bears no rational relationship to a state interest. By denying Turner's claims, the Kentucky Court of Appeals has violated the tenants of *Reed* and has affirmed Kentucky precedent that is directly at odds with longstanding constitutional jurisprudence of this Court.

II. The Kentucky Supreme Court's Adoption of a Prospective-Only Application of *Trimble* Conflicts with Decisions of Other State Courts.

After applying *Trimble* to invalidate their own similar statutes, other state courts addressing the prospective/retroactive application of *Trimble* have consistently recognized retroactivity. Some of these decisions recognizing the retroactive application of *Trimble* were decided before *Reed* and others were decided with the benefit of *Reed*, but none adopts an absolute bar to retroactive application such as the Kentucky courts have applied to deny Turner's claims.

For example, in *Marshall v. Marshall*, 670 S.W.2d 213 (Tenn. 1984), the Supreme Court of Tennessee recognized that "retrospective application of a decision overruling an earlier decision ordinarily is denied only if such an application would work a hardship upon those who have justifiably relied upon the old precedent." *Id.* at 215 (citations omitted). As such, the Supreme Court of Tennessee held that, since the parties had not relied upon old law and had passively acquired rights as the heirs at law of an intestate property owner, the rule announced in *Allen v. Harvey*, 568 S.W.2d 829 (Tenn. 1978) (holding that a child born out of wedlock could inherit from his intestate father provided that parent-child relationship was shown by clear and convincing evidence), could be applied retroactively.

The Supreme Court of Appeals for West Virginia expanded on this limited retroactivity rule in

Williamson v. Gane, 176 W.Va. 443, 345 S.E.2d 318 (1986). While recognizing that the principal reason for limiting the retrospective reach of *Trimble* is to prevent chaotic conditions concerning real property titles and acknowledging that such a consideration has a proper place in the retroactivity determination, the Supreme Court of Appeals of West Virginia nonetheless concluded that retroactivity may be extended "in a way that justly and fairly reconciles the constitutional interests in equality ... with reliance and finality interests." *Id.* at 320. As such, the court held that its decision in *Adkins v. McEldowney*, 167 W.Va. 469, 280 S.E.2d 231 (1981) (which invalidated a West Virginia statute similar to that involved in *Trimble*) should be given retroactive effect if any of the following conditions is met: (1) there has been no justifiable and detrimental reliance upon the pre-*Trimble* law; (2) the subject property has not been transferred to an innocent purchaser for value; or, (3) the estate administration is subject to further resolution. *Id.* at 322.

Likewise, in *Mitchell v. Hardwick*, 297 S.C. 48, 374 S.E.2d 681 (1988), the South Carolina Supreme Court adopted a rule of limited retroactivity. The court first recognized the major arguments against applying *Trimble* retroactively: (1) the denial of rights of those who detrimentally relied on old law; (2) the difficulty of proving paternity; and, (3) the disruption of the probate process. *Id.* at 682-83. And, in light of these concerns, the South Carolina Supreme Court held that limited retroactive application of *Trimble* is only appropriate when an innocent purchaser will not be adversely affected by

detrimental reliance on the old law, the paternity of the child has been conclusively established, and the estate administration is subject to further resolution. *Id.*

This approach was also adopted by the Supreme Court of Hawaii in *Ka'u Agribusiness Co., Inc. v. Heirs or Assigns of Ahulau*, 105 Haw. 182, 95 P.3d 613 (2004). Unlike the courts in the above-mentioned opinions, the Supreme Court of Hawaii was able to examine the retroactive application of *Trimble* with the benefit of this Court's decision in *Reed*. After a thorough analysis of the decisions of other states, the Supreme Court of Hawaii adopted the same three-prong test announced by the South Carolina Supreme Court in *Mitchell*. The court reasoned that the limited retroactive application of *Trimble* as adopted in *Mitchell* is appropriate because it addresses the concerns raised by this Court in both *Trimble* and *Reed*:

> In sum, the *Mitchell* test recognizes inheritance rights of "some significant categories of illegitimate children of intestate men ... without jeopardizing the orderly settlement of estates or the dependability of titles to property passing under intestacy laws," *Trimble*, 430 U.S. at 771, 97 S.Ct. 1459, and therefore it preserves the valid state interests at issue, *i.e.*, the "accurate and efficient disposition," *id.* at 777, 97 S.Ct. 1459, and "orderly and just distribution" of estates, *Reed*, 476 U.S. at 855, 106 S.Ct. 2234.

> Furthermore, its requirements provide "a more demanding standard," in the area of proof of paternity, as the Court advised in *Trimble*, 430 U.S. at 770, 97 S.Ct. 1459.

Ka'u Agribusiness Co., Inc., 105 Haw. at 192, 95 P.3d at 623. Other state courts have also retroactively applied *Trimble* in light of the *Reed* decision. *See, e.g., Collier v. Shell Oil Co.*, 534 So.2d 1015 (Miss. 1988); *Henson v. Jarmon*, 759 S.W.2d 368 (Tex. App. 1988).

While there are some differences among the tests for retroactivity announced in these decisions, they consistently recognize that a prospective-only application of *Trimble* is unconstitutional. This Court similarly refused to adopt a prospective-only approach in *Reed*. So, not only does the rule of law announced by the Kentucky Supreme Court in *Pendleton v. Pendleton*, 560 S.W.2d 538 (Ky. 1978) and applied by the Kentucky Court of Appeals in the opinion below ignore this Court's holding in *Reed*, but the prospective-only rule used to deny Turner's right to inherit from her father also ignores the well-reasoned opinions of numerous state courts of last resort.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

JAMES E. KELLER
Counsel of Record
GESS MATTINGLY &
ATCHISON, P.S.C.
201 West Short Street
Lexington, KY 40507
Telephone (859) 252-9000
Counsel for Petitioner

May 12, 2008.

APPENDIX A

COMMONWEALTH OF KENTUCKY
PERRY CIRCUIT COURT
CIVIL ACTION NO. 05-CI-00448

No. 02-5099

PERRY COUNTY COAL CORPORATION, Plaintiff

V.

HOMER YOUNG, ET AL., Defendants

[Entered: May 1, 2006]

PARTIAL SUMMARY JUDGMENT

The above cause having come on for hearing on April 7, 2006, on the Motion for Partial Summary Judgment filed by Plaintiff, Perry County Coal Corporation, the Motion for Partial Summary Judgment filed by Defendant, Betty Turner, and the Motion for Partial Summary Judgment filed by Defendant, Homer Young, whereby each moving party sought entry of a Summary Judgment adjudicating the issues of whether Defendant, Betty Turner, is the child of John B. "Buck" Combs, and of whether Defendant, Betty Turner, has an interest in the subject real property by virtue of Kentucky's law

of intestate succession; there being no issue as to any material fact herein; and, the Court having reviewed the record and Memoranda of Law contained therein, heard statements of counsel, and being otherwise sufficiently advised on the basis of the record herein;

IT IS ORDERED AND ADJUDGED by the Court as follows:

(1) This Court has jurisdiction of the parties and the subject matter of this action.

(2) Based on the record herein, and the clear and convincing and undisputed proof contained therein, including the birth certificate of Betty Turner, the marriage license of Betty Turner, the deposition testimony of Betty Turner, and the deposition testimony of A.B. Olinger, the Defendant, Betty Turner, is the natural child of John B. "Buck" Combs.

(3) John B. "Buck" Combs died intestate on December 29, 1962. KRS 391.090 in effect on that date provided that a child born out of wedlock shall inherit only from his mother unless the father marries the mother and recognizes the child as his, in which case the child shall be deemed legitimate and shall inherit from his father. The mother of Betty Turner never married John B. "Buck" Combs.

(4) From the death of John B. "Buck" Combs on or about December 29,1962, until the conveyances of purported interests in the subject real property by the alleged heirs of John B. "Buck" Combs to

Plaintiff, Perry County Coal Corporation, in 2004, there were no legal actions concerning, conveyances of, or other ousters from the subject real property so that the claims of Defendants, Betty Turner and Homer Young, were timely brought within the fifteen-year statute of limitations for the recovery of real property set forth in KRS 413.010.

(5) Accordingly, although Defendant, Betty Turner, is the child of John B. "Buck" Combs, and her claims were brought within the limitations period set forth in KRS 413.010, her claims are barred by the holding in **Pendleton v Pendleton, 560 S.W. 2d 538 (Ky. 1978)** (hereinafter referred to as **Pendleton II**), wherein the Supreme Court of Kentucky adopted a prospective-only application rule for the holding of the Supreme Court of the United States in **Trimble v Gordon, 430 U.S. 762 (1977)** by holding that "its opinion shall have no retroactive effect upon the devolution of any title occurring before April 26, 1977 (the date of the Trimble opinion), except for those specific instances in which the dispositive constitutional issue raised in this case was then in the process of litigation." **Pendleton II at 539.**

(6) Partial Summary Judgment to the extent set forth herein is awarded at this time against Defendant, Betty Turner, and in favor of Plaintiff, Perry County Coal Corporation, and Defendant, Homer Young. Accordingly, the Counterclaim and Cross-claim of Defendant, Betty Turner, is dismissed.

(7) Pursuant to Civil Rule 54.02(1), there is no

just reason for delay, and this Partial Summary Judgment is a Final and Appealable Judgment.

(8) Pursuant to Civil Rule 77.04, the Clerk of this Court is hereby Ordered and directed to serve copies of this Partial Summary Judgment upon all of the parties to this action.

This the 1 day of May, 2006.

/s/ William Engle, III
WILLIAM ENGLE, III
JUDGE, PERRY CIRCUIT COURT

APPENDIX B

RENDERED: APRIL 6, 2007; 10:00 A.M.
TO BE PUBLISHED

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

No. 2006-CA-001019-MR

BETTY TURNER, Appellant

v.

PERRY COUNTY COAL CORPORATION and
HOMER YOUNG, Appellees

Appeal from Perry Circuit Court
Honorable William Engle III, Judge
Action No. 05-CI-00448

OPINION AFFIRMING

BEFORE: LAMBERT AND STUMBO, JUDGES; BUCKINGHAM,[2] SENIOR JUDGE.

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[1] Senior Judge David C. Buckingham sitting as Special Judge by assignment of Chief Justice pursuant to Section 110(5)(b) of the Kentucky Constitution and Kentucky Revised Statutes (KRS) 21.580. Harrison County Sheriff's Office.

BUCKINGHAM, SENIOR JUDGE: Betty Turner appeals from an order of the Perry Circuit Court granting Perry County Coal Corporation and Homer Young summary judgment on the issue of whether Turner has an ownership claim to real property located in Perry County, Kentucky. For the reasons below, we affirm.

Turner was born out of wedlock on May 22,1932, to Susie Coots. Her father was John B. "Buck" Combs. Combs and Coots never married, though Combs supported Turner as a child. In May 1948 Combs acquired property located on Curley Fork of Browns Fork of Big Creek in Perry County. He continued to own the property until his death on December 29, 1962. Combs died intestate and left no direct descendents other than Turner.

On February 16, 1967, Malvia Combs Young, Buck Combs's second cousin, executed and recorded an affidavit of descent for Combs. The affidavit identified various second and third cousins as intestate successors to the real property of Buck Combs, including the subject property. Thereafter, until 2004, there were no transfers or other proceedings involving the property.

In late 2004, Perry County Coal, relying on the 1967 affidavit of descent, purchased several undivided interests in the property. Having obtained such interests, on August 23, 2005, the coal company filed an action in Perry Circuit Court to partition the

property. Among the defendants named were Turner, whom the complaint identified as "may be claiming an interest in the property", and appellee Homer Young.

Turner filed an answer and counterclaim contending that she was the sole heir-at-law of Buck Combs and, accordingly, was the owner of the property. Replies to Turner's counterclaim by the coal company and Young denied Turner's assertion of title.[3]

The parties subsequently filed motions for summary judgment on the issues of whether Turner is the child of Buck Combs and whether Turner has an interest in the property by virtue of Kentucky's laws of intestate succession. On May 1,2006, the circuit court entered an order determining that Turner was the child of Buck Combs,[4] but that Turner had no claim to the property under the applicable laws of intestate succession. Turner thereafter appealed from the portion of the order that denied her claim to the property.

Summary judgment is proper where there exists no genuine issue of material fact and the movant is entitled to judgment as a matter of law. Kentucky Rule of Civil Procedure (CR) 56.03; *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476 (Ky. 1991). Questions of law are reviewed de novo on

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[2] In his answer and counterclaim to the original complaint, Young asserted sole ownership to the property by adverse possession.

[3] This issue is not now disputed.

appeal. *Gosney v. Glenn*, 163 S.W.3d 894, 898 (Ky.App. 2005). The relevant facts in this case are not in dispute, and the only issue before us is whether Turner has a claim to the subject property under the relevant Kentucky laws of intestate succession.

At the time of Buck Combs's death in 1962, Kentucky Revised Statute (KRS) 391.090(2) was in effect. It stated, in relevant part, that "[a] bastard shall inherit only from his mother and his mother's kindred." Because of this provision in Kentucky intestate succession laws, Buck Combs's property did not pass to Turner as it would today.

In *Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977), the U.S. Supreme Court held that statutes, such as KRS 391.090(2), discriminating against illegitimate children were unconstitutional under the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution. In accordance with *Trimble*, in *Pendleton v. Pendleton*, 560 S.W.2d 538 (Ky. 1977)(*Pendleton II*), the Kentucky Supreme Court struck down KRS 391.090(2). In so doing, however, the court stated:

> Insofar as it declares the invalidity of KRS 391.090 this opinion shall have no retroactive effect upon the devolution of any title occurring before April 26, 1977 (the date of the Trimble opinion), except for those specific instances in which the dispositive constitutional issue raised in this case was then in the process of litigation.

560 S.W.2d at 539.

"It is a well known and established rule of law in

this jurisdiction that upon the death of a person intestate, title to his real estate immediately vests in his heirs at law[.]" *Rose v. Rose*, 296 Ky. 18, 22, 176 S.W.2d 122, 124 (1943). Thus, upon Buck Combs's death on December 29, 1962, the subject property passed to his heirs-at-law under the then-existing laws of intestate succession. Those heirs were identified in the May 1967 affidavit of descent filed by Malvia Combs Young. Because *Pendleton II* had "no retroactive effect upon the devolution of any title occurring before April 26,1977," its striking down of KRS 391.090(2) did not, and may not now, have an effect upon the title to the subject property.

Turner argues that, contrary to the aforementioned language in the *Pendleton II* case, the *Trimble* case applies retroactively. In support of this argument, she relies on *Reed v. Campbell*, 416 U.S. 852, 106 S.Ct. 2234, 90 L.Ed.2d 858 (1986). In that case, the illegitimate child's father died intestate in 1976, and an administratrix of his estate was appointed shortly thereafter. The *Trimble* case was decided by the U.S. Supreme Court in 1977, four months after the decedent's death. The Texas statute in effect at the time of the death prohibited an illegitimate child from inheriting from his or her father unless the parents had subsequently married. In February 1978, the illegitimate child notified the administratrix and the probate court of her claim. A formal civil action was filed shortly thereafter.

After finding that the claimant was the child of the decedent, the Texas courts rejected the claim on the grounds that *Trimble* did not apply retroactively. The U.S. Supreme Court reversed the Texas courts

and held that *Trimble* applied retroactively to the facts of the case. 476 U.S. at 857. However, the Court recognized that:

> [t]he state interest in the orderly disposition of decedents' estates may justify the imposition of special requirements upon an illegitimate child who asserts a right to inherit from her father, and, of course, it justifies the enforcement of generally applicable limitations on the time and the manner in which claims may be asserted. After an estate has been finally distributed, the interest in finality may provide an additional, valid justification for barring the belated assertion of claims, even though they may be meritorious and even though mistakes of law or fact may have occurred during the probate process.

Id. at 855-56.

The facts in this case are distinguishable from those in *Reed*. In *Reed*, the illegitimate child's claim was made while the estate remained open in the probate court. Here, the decedent had been dead for over 40 years.[5] In accordance with the aforementioned language in Reed, we conclude that the state's interest in finality provides justification for barring Turner's claim. In short, the rule stated by our supreme court in *Pendleton II* was not changed by the U.S. Supreme Court in *Reed*. *See*

---

[5] There was never any settlement of the estate of Buck Combs.

Pendleton v. Centre College of Kentucky, 818 S.W.2d 616, 619 (Ky.App. 1990)(*Pendleton III*). Thus, the circuit court properly awarded summary judgment against Turner.

The judgment of the Perry Circuit Court is affirmed.

ALL CONCUR.

APPENDIX C

SUPREME COURT OF KENTUCKY

2007-SC-0309-D
(2006-CA-1019)

BETTY TURNER, MOVANT

V.

PERRY COUNTY COAL CORPORATION and
HOMER YOUNG, RESPONDENTS

Perry Circuit Court
No. 2005-CI-0448

ORDER

The motion for review of the decision of the Court of Appeals is denied.

ENTERED February 13, 2008.

/s/ Joseph E. Lambert
CHIEF JUSTICE

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(2)

No. 07-1425

FILED
JUN 16 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

BETTY TURNER,

Petitioner,

v.

PERRY COUNTY COAL CORPORATION
and HOMER YOUNG,

Respondents.

On Petition For Writ Of Certiorari
To The Kentucky Court Of Appeals

BRIEF IN OPPOSITION ON BEHALF OF PERRY COUNTY COAL CORPORATION, RESPONDENT

CHARLES J. BAIRD
Counsel of Record
BAIRD AND BAIRD, P.S.C.
162 Second Street
P. O. Box 351
Pikeville, Kentucky 41502
Telephone (606) 433-2100
Facsimile (606) 433-2109
Counsel for Respondent,
Perry County Coal Corporation

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Whether a state court is justified in not allowing a child born out of wedlock to inherit from the child's father under the state's law of intestate succession where the father died in 1962, more than 40 years prior to the child asserting her claim and more than 15 years prior to the date this Court decided *Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977).

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STATEMENT OF THE CASE

The Petitioner, Betty Turner (hereinafter "Turner"), asserts she is the sole heir of John B. Combs and is therefore the sole owner of the real property he owned at his death on Browns Fork of Big Creek in Perry County, Kentucky (hereinafter the "Real Property"). Turner was born out of wedlock in 1932. It is undisputed that she is the daughter of John B. Combs who died intestate in 1962 when Kentucky Revised Statute (KRS) §391.090(2) (repealed in 1986) provided that a child born out of wedlock could not inherit from his or her father.

In 1967 an Affidavit of Descent was recorded as required by KRS §382.120. An Affidavit of Descent is the recorded instrument which completes the chain of title to real estate when the owner dies intestate. The Affidavit of Descent identifies the heirs of John B. Combs as his second cousins and did not mention Turner.

In 2004, in reliance on the recorded Affidavit of Descent, the Respondent, Perry County Coal Corporation (hereinafter "Perry County Coal"), purchased a 40% undivided interest in the Real Property by three (3) separate deeds from certain of the heirs of John B. Combs who were named in the recorded Affidavit of Descent. The total purchase price paid by Perry County Coal for the three (3) conveyances was $39,166.00.

Turner testified in the proceedings below that she had not visited the Real Property and had made no

inquiries about the Real Property since the death of John B. Combs. Turner testified that, "I just didn't think about it at all".

In August of 2005, Perry County Coal initiated a civil action in the Perry Circuit Court seeking an adjudication of the ownership of the Real Property and a partition of the Real Property. The civil action named all the heirs, both known and unknown, of John B. Combs, and also named Turner as a defendant because she was someone "who may be claiming an interest in the property". Turner filed a counterclaim and a cross-claim in the action below claiming she was the sole heir of John B. Combs, and therefore was the sole owner of the Real Property. Homer Young, a Respondent herein, also filed a counterclaim and cross-claim claiming to be an owner of the Real Property as a result of being an heir of John B. Combs and by adverse possession.

It is undisputed that from the date of John B. Combs' death in 1962 until the three (3) conveyances transferring the undivided 40% interest in the Real Property by certain of the heirs of John B. Combs to Perry County Coal in 2004, there were no legal actions concerning the Real Property and no conveyances of any interest therein by anyone.

In the proceedings below the parties filed cross-motions for Summary Judgment. The Perry Circuit Court ruled KRS §391.090 was in effect on the date of John B. Combs' death and provided a child born out of wedlock shall inherit only from his mother unless the

father marries the mother and recognizes the child as his. Based on the above stated facts, the Perry Circuit Court ruled Turner's claims were barred by the holding in *Pendleton v. Pendleton*, 560 S.W.2d 538 (Ky. 1978), (hereinafter "*Pendleton II*"), and stated as follows:

> Accordingly, although Defendant, Betty Turner, is the child of John B. "Buck" Combs, and her claims were brought within the limitations period, set forth in KRS §413.010, her claims are barred by the holding in *Pendleton v. Pendleton*, 560 S.W.2d 538 (Ky. 1978), (hereinafter referred to as *Pendleton II*), wherein the Supreme Court of Kentucky adopted a prospective only application rule of the holding of the Supreme Court of the United States in *Trimble v. Gordon*, 430 U.S. 762 (1977), by holding that "its opinion shall have no retroactive effect upon the devolution of any title occurring before April 26, 1977, except for those specific instances in which the dispositive constitutional issues raised in this case was then in the process of litigation". *Pendleton II* at 539.

A copy of the Summary Judgment entered by the Perry Circuit Court is attached to the Petition for Writ of Certiorari in Appendix A.

The Perry Circuit Court granted Summary Judgment in favor of the Respondents herein, Perry County Coal and Homer Young, and dismissed Turner's counterclaim and cross-claim.

Turner appealed the Perry Circuit Court's Summary Judgment to the Kentucky Court of Appeals which held that the law in Kentucky is that "upon the death of a person intestate, title to his real estate immediately vests in his heirs at law", citing *Rose v. Rose*, 296 Ky. 18, 22, 176 S.W.2d 122, 124 (1943). The Court of Appeals held that upon the death of John B. Combs in 1962 the Real Property immediately passed to his heirs at law "under the then existing laws of intestate succession". The Kentucky Court of Appeals refused to apply the Kentucky Supreme Court's ruling in *Pendleton II* to this case because *Pendleton II* had "no retroactive effect upon the devolution of any title occurring before April 26, 1977, its striking down of KRS §391.090(2) did not, and may not now, have an effect upon the title to the subject property".

The Court of Appeals in this case further went on to discuss the applicability of *Reed v. Campbell*, 416 U.S. 52, 106 S.Ct. 2234, 90 L.Ed.2d 858 (1986), (hereinafter "*Reed*"), and held as follows:

> The facts in this case are distinguishable from those in *Reed*. In *Reed*, the illegitimate child's claim was made while the estate remained open in the probate court. Here, the decedent had been dead for over 40 years. In accordance with the aforementioned language in *Reed*, we conclude that the state's interest in finality provides justification for barring Turner's claim. In short, the rule stated by our supreme court in *Pendleton II* was not changed by the U. S. Supreme Court in *Reed*.

Perhaps the most important finding by the Kentucky Court of Appeals was its statement referring to when Perry County Coal purchased several undivided interests in the Real Property in 2004 it was "relying on the 1967 affidavit of descent".

The Opinion Affirming entered by the Kentucky Supreme Court is attached to the Petition for Writ of Certiorari in Appendix B.

Turner filed a Motion for Discretionary Review with the Kentucky Supreme Court which was denied and the Motion for Writ of Certiorari was thereafter filed by Turner requesting that the United States Supreme Court overturn the decisions of the Kentucky courts. A copy of the Order entered by the Kentucky Supreme Court denying Turner's Motion for Discretionary Review is attached to the Petition for Writ of Certiorari in Appendix C.

REASONS FOR DENYING WRIT OF CERTIORARI

THE KENTUCKY SUPREME COURT'S ORDER AND THE KENTUCKY COURT OF APPEALS' OPINION DO NOT FOLLOW A PROSPECTIVE ONLY APPLICATION OF *TRIMBLE* AND DOES NOT CONFLICT WITH PRIOR DECISIONS OF THIS COURT OR THE DECISIONS OF OTHER STATE COURTS

Turner incorrectly states that the "sole" basis for the Kentucky Court of Appeals' Opinion and the

Kentucky Supreme Court's Order denying the Motion for Discretionary Review was that her father died prior to April 26, 1977, the date this Court decided *Trimble v. Gordon*, 430 U.S. 762, 97 S.Ct. 1459, 52 L.Ed.2d 31 (1977) (hereinafter "Trimble"). In fact, the Kentucky Court of Appeals evaluated the facts of the case and compared them to the facts in *Reed* and made the following determinations: (i) Perry County Coal "relied" on the 1967 Affidavit of Descent when it purchased several undivided interests in the property; (ii) The decedent (John B. Combs) had been dead for over 40 years when Turner first made her claim; (iii) In Kentucky, title to real estate immediately vests in the decedent's heirs at law upon the decedent's death; and (iv) The state's interest in finality provided justification for barring Turner's claim.

The Kentucky Court of Appeals closely considered the decision of the United States Supreme Court in *Reed* and found that the facts in *Reed* did not resemble the facts in the present case. The United States Supreme Court in *Reed* did not state that *Trimble* must be applied retroactively in all cases. In fact, *Reed* and all the state court cases cited in the Petition for Writ of Certiorari are based on very limited factual circumstances, none of which are applied by the Petitioner to the facts of this case. Brief descriptions of the cases cited by the Petitioner, all of which cite *Trimble*, and some of which apply *Trimble* retroactively, are as follows:

1. *Reed v. Campbell*, 416 U.S. 52, 106 S.Ct. 2234, 90 L.Ed.2d 858 (1986)

   One year prior to the "illegitimate" child appellant's birth her parents had a ceremonial marriage. The marriage was later invalidated because the father's divorce from his previous wife was not yet finalized. The father died four months prior to this Court's decision in *Trimble* and the estate was still open when the "illegitimate" child asserted her claim. Under the above facts the Court applied *Trimble* retroactively.

2. *Marshall v. Marshall*, 670 S.W.2d 213 (Tenn. 1984)

   The father died in 1975 and lawsuits amongst the family involving the subject property's descent were ongoing in 1978. The court allowed retroactive application of *Trimble* only where there would be no hardship on innocent purchasers for value who had justifiably relied upon the old precedent.

3. *Williamson v. Gane*, 176 W.Va. 443, 345 S.E.2d 318 (1986)

   The father died in late 1974 and lawsuits amongst the family involving the subject property's descent were ongoing in 1983. The appellate court reviewed the trial court's denial of the illegitimate children's motion to intervene. The court stated it would not retroactively apply *Trimble* where there was justifiable detrimental reliance on the old law, where the property had been transferred

to an innocent purchaser for value or where the estate was not subject to further resolution. The West Virginia court remanded the case to the lower court for determination of the facts as they apply to the principles set forth in the decision.

4. *Mitchell v. Hardwick*, 297 S.C. 48, 374 S.E.2d 681 (1988)

   The father died in 1975 a year after having acknowledged the illegitimate child as his son in a signed and recorded deed. No transfers of the estate property had occurred and the estate's administration had not been completed. The court stated it would not apply *Trimble* retroactively where there was justifiable detrimental reliance on the old law by an innocent purchaser for value, where the paternity of the child had not been conclusively established or where the estate was not subject to further resolution, none of which were present in this South Carolina case.

5. *Kau Agribusiness Co., Inc. v. Heirs of Assigns of Ahulau*, 105 Haw. 182, 95 P.3d 613 (2004)

   The plaintiff corporation was the remote successor in interest of the siblings of the father who died in the 1930's. Many transfers of the property had occurred and the court denied to grant the illegitimate children an interest in the property. The court adopted the reasoning and requirements of *Mitchell v. Hardwick* above and specifically cited it and the requirements set forth therein. The

> Hawaii court found that the children did not meet the tests set forth in *Mitchell v. Hardwick* and did not apply *Trimble* retroactively.

The Petitioner does not apply any of the principles cited in the above cases to the facts of the present case. In the facts at hand the father, John B. Combs, died in 1962 and the Affidavit of Descent was recorded in 1967. Perry County Coal "relied" on the validity of the recorded Affidavit of Descent when it purchased an undivided 40% interest in the property through three (3) separate deeds from the heirs stated in the Affidavit of Descent. There was no litigation pending at the time of the 2004 conveyances. The above facts do not satisfy any of the requirements of any of the cases referenced by the Petitioner, and therefore, the Kentucky courts were correct in not applying *Trimble* retroactively.

The Petitioner appears to be relying on *Reed* for her proposition that the holding of *Trimble* should be applied retroactively without limitation, which is not correct. The Perry Circuit Court and the Kentucky Court of Appeals closely compared the facts in *Reed* with the facts in the present case and the Kentucky Court of Appeals quoted the following provisions in *Reed* and based its decision thereon:

> [t]he state interest in the orderly disposition of decedents' estates may justify the imposition of special requirements upon an illegitimate child who asserts a right to inherit from her father, and, of course, it justifies the enforcement of generally applicable

> limitations on the time and the manner in which claims may be asserted. After an estate has been finally distributed, the interest in finality may provide an additional, valid justification for barring the belated assertion of claims, even though they may be meritorious and even though mistakes of law or fact may have occurred during the probate process.

The Kentucky Court of Appeals then distinguished *Reed* from the present case and held as follows:

> The facts in this case are distinguishable from those in *Reed*. In *Reed*, the illegitimate child's claim was made while the estate remained open in the probate court. Here, the decedent had been dead for over 40 years. In accordance with the aforementioned language in *Reed*, we conclude that the state's interest in finality provides justification for barring Turner's claim.

Nothing in its opinion and the heretofore cited facts discussed by the Kentucky Court of Appeals suggests that the sole reason for its decision was that Turner's father died before April 26, 1977. *Reed*, in effect, stated that *Trimble* should in certain limited factual circumstances be applied retroactively, but the facts of this case do not justify doing so and the Kentucky Court of Appeals and the Kentucky Supreme Court correctly so decided.

CONCLUSION

For the foregoing reasons, the Respondent, Perry County Coal Corporation, respectfully requests that the United States Supreme Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

HON. CHARLES J. BAIRD
BAIRD AND BAIRD, P.S.C.
162 Second Street
P. O. Box 351
Pikeville, Kentucky 41502
Kentucky Bar No. 2573
Telephone: (606) 433-2100
Facsimile: (606) 433-2109
Counsel for Respondent,
Perry County Coal Corporation